Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Report to Congress On Universal Service Under The Telecommunications Act of 1996	CC Docket No. 96-45

COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL AND THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

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SUMMARY

In the Telecommunications Act of 1996, Congress declared that competition should drive the development of communications markets and recognized that the markets for information services have thrived because they have not been subject to pervasive regulation. Consistent with Congressional intent, and the plain language of the Act, the Commission has interpreted the statutory terms under review in this proceeding in a manner that permits competition, rather than regulation, to govern the development of information services markets.

The Commission's consistent refusal to regulate competitive information services markets based on its reading of the statutory terms under review has improved consumer welfare and produced significant benefits for telecommunications providers. Unfettered competition in information services markets has generated innovation, consumer choice, and competitive pricing in products and services, to the benefit of consumers. The vigorous growth in such markets has also fueled demand for telecommunications services, thereby benefiting telecommunications providers, including those providers that receive universal service funds. Any interpretation of the statutory terms under consideration in this docket other than that already adopted by the Commission would diminish consumer welfare and ignore Congress' intent.

Congress' non-regulatory treatment of information services markets has also furthered the Act's universal service objectives. The unfettered growth in these markets has stimulated demand for telecommunications services, thereby increasing the customer and revenue base from which universal service contributions are collected.

The Commission's interpretation of the relevant statutory terms correctly recognizes that information services providers ("ISPs"), like other users of telecommunications services, are the ultimate payors of universal service contributions, since telecommunications providers merely pass through to ISPs and other customers the costs associated with the IXCs' payment of explicit universal service contributions. The effect of imposing direct universal service contributions on ISPs would be to make them contribute twice.

The Commission should continue to interpret the terms under review in a manner consistent with the statutory definitions and underlying legislative history. In so doing, the Commission will remain faithful to the clear language used and pro-competitive intent manifested by Congress in defining these terms and establishing a pro-competitive, de-regulatory framework for telecommunications.

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The Information Technology Industry Council ("ITI") and the Information Technology Association of America ("ITAA") offer the following joint comments in response to the Federal Communications Commission's ("Commission" or "FCC") January 5, 1998 Public Notice regarding the matter captioned above. ITI is the leading trade association for manufacturers and vendors of computers, computing devices, office equipment and information services. ITI represents a variety of information technology companies, including manufacturers, integrators and service providers. For more than two decades, ITI (and its predecessor, the Computer and Business Equipment Manufacturers Association) has played a leading role in the development of rules governing the design, development and marketing of computing devices.

ITAA is one of the principle trade associations of the Nation's information technology industries. Together with its twenty-five affiliated regional technology councils, ITAA represents more than 9,000 companies throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. The manufacturers of information technology products and the information service providers who make up ITI's and ITAA's membership urge the Commission to continue its implementation of the pro-competitive, de-regulatory policies embodied in the1996 Telecommunications Act's[1] ("1996 Act" or "Act") treatment of the information services marketplace.

DISCUSSION

The Commission was directed by Congress to review its implementation of the Act, particularly its interpretation of certain key terms and definitions, and submit a report to Congress regarding the extent to which the Commission's interpretations are consistent with the Act. For the reasons discussed below, ITI and ITAA urge the Commission to re-affirm that its previous interpretations of key definitions in the Act are not only consistent with but compelled by the plain language of the Act, by its legislative history, and by sound public policy.

I. THE COMMISSION INTERPRETED THE ACT IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND LEGISLATIVE HISTORY

The Commission's prior orders interpreting the 1996 Act properly distinguished between "information services" and the services described in the Act's definitions for

[1] Telecommunications Act of 1996, Pub. L. No. 104-104 110 Stat. 56 (1996) (codified at 47 U.S.C. Section 151 *et. seq.*).

telecommunications," "telecommunications service," and "telecommunications carrier." Based on those definitions, the Commission concluded that information services providers ("ISPs") are not subject to the Act's provisions requiring universal service subsidy payments to eligible local exchange carriers ("LECs")[2] because ISPs are not providers of "telecommunications" as the term is defined in the Act. The Commission's previous interpretations of these key terms and provisions are consistent with the statute and the intent of Congress expressed in the legislative history.

A. "Telecommunications," "Telecommunications Service," and "Telecommunications Carrier"

The 1996 Act defines "telecommunications" as

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[3]

By specifying services that do not change the "form or content" of a user's information, Congress explicitly limited the category of "telecommunications" to basic transmission services and excluded information services because information services necessarily involve changes in the form or content of information as it is processed and delivered to users.

This result is consistent with the legislative history of the definition of "telecommunications." The definition which appears in the Act was taken from the Senate's definition in its draft legislation.[4] The Senate report explaining its definition

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[2] *Federal-State Joint Board on Universal Service*, CC Dkt. 96-45, Report and Order, 12 FCC Rcd 8776, at ¶ 789 (rel. May 8, 1997) ("Universal Service Order").

[3] 47 U.S.C. § 153(48).

[4] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996) (The House recedes to Senate with amendments with respect to the definition[] of . . . "telecommunications."

stated that the term "'telecommunications" "excludes those services . . . that are defined as information services."[5] The report also stated that "'telecommunications service' *does not include information services"* but does include transmission.[6]

As a result, the terms "telecommunications service"[7] and "telecommunications carrier"[8] exclude information services and ISPs. The definitions in the Act for both terms use the term "telecommunications" to describe the services and service providers, respectively, to which those terms apply. Through its use of the term "telecommunications" in both definitions, Congress limited "telecommunications service" to the offering of "telecommunications" for a fee and limited "telecommunications carriers" to providers of "telecommunications." Thus, information services and ISPs are excluded from both of these subsidiary definitions.

B. "Information Services"

The distinction between an "information service" and the services included in the scope of the definitions for "telecommunications," telecommunications service," and "telecommunications carrier" is reinforced by the Act's definition of an "information service":

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a

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5 S. Rep. No. 23, 104th Cong., 1st Sess. 17-18 (1995).

6 S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995) (emphasis added).

7 47 U.S.C. § 153(46).

8 47 U.S.C. § 153(44).

> telecommunications system or the management of a telecommunications service.[9]

This definition confirms that "information services" and "telecommunications" are not the same by explicitly using the phrase "via telecommunications" to refer to the means by which information services are offered. If "information services" were "telecommunications," the use of the phrase "via telecommunications" would be meaningless.

Congress clearly intended that the term "information services" mean something more than the simple transmission services of "telecommunications." Congress defined information services to include offerings that allow users to obtain, interact with, transform, and store information. Such services include alarm monitoring, voice mail, on-line databases, remote data processing, and Internet access. The report accompanying the Senate's version of the 1996 Act was unusually explicit regarding the relationship between these terms, noting that "information providers do not 'provide' telecommunications services; they are *users* of telecommunications services."[10]

The distinction between "information services" and "telecommunications" is also supported by the use of both terms in other provisions of the 1996 Act, *e.g.*, the language of Section 254(h)(2) of the 1996 Act. That section refers to both "advanced telecommunications" and "information services." Under standard principles of statutory construction, the Commission could not reasonably interpret "telecommunications" and "information services" to refer to the same services because doing so would make the

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[9] 47 U.S.C. § 153(20) (emphasis added).

use of both terms superfluous in provisions like Section 254(h)(2), rather than giving meaning to all of the terms Congress chose to include in the statute.[11]

C. Mixed or Hybrid Services Are Information Services

Consistent with the statutory definitions of the foregoing terms, the Commission must treat providers of so-called "mixed" or "hybrid" services as providers of "information services" rather than "telecommunications service." Although the appropriations legislation failed to define the terms "mixed" and "hybrid," the 1996 Act defined "information services" and "telecommunications." The statutory classification of services as either "information services" or "telecommunications" does not contemplate some third category of "mixed" services that is both and neither. Accordingly, the Commission should first attempt to include services in the categories created by Congress when it defined "information services" and "telecommunications services," rather than seeking in the first instance to force services into a new classification like "mixed" or "hybrid" that Congress did not provide for in the statute. To do so, the Commission must classify "mixed" or "hybrid" services as "information services" rather than "telecommunications service."

As noted above, the term "telecommunications service" refers only to basic transmission services provided on a common carrier basis. "Information services," by contrast, refers to a broad spectrum of information processing capabilities made available "via telecommunications" – that is, information services "mix" the capabilities

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[10] S. Rep. No. 104-23, at 28 (1995)

[11] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-698 (1995).

listed in the definition of information services with the telecommunications "via" which subscribers receive their information services. By defining "information services" as capabilities that are offered "via telecommunications," the statute already addresses services that "mix" the capabilities of "information service" with the basic transmission of "telecommunications" and includes such services within the scope of "information services." A "mixed" or "hybrid" service would therefore appear to be merely an example of an "information service." The creation of some vague alternative class of "mixed" or "hybrid" services, which combine with "telecommunications" the various functionalities described in the definition of "information services," would be inconsistent with the clear Congressional intent expressed in the definition of "information services."

D. Congressional Findings and Policy in § 230

In the Telecommunications Act, Congress concluded that the Internet and other interactive computer services have "flourished, to the benefit of all Americans," as a result of minimal government regulation.[12] Accordingly, it declared the policy of the United States to be

> to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.[13]

If the Commission interprets "telecommunications" to include information services, then not only universal service contribution obligations but the full panoply of Title II statutory and regulatory requirements would apply to ISPs and providers of

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12 47 U.S.C. § 230(a)(4).

13 47 U.S.C. § 230(b)(2).

Internet or other computer based services. Such a result would be inconsistent with the express terms of Section 230 and, by burdening the competitive market for Internet and other interactive computer services with unnecessary regulatory requirements, would clearly be inconsistent with Congress' findings and mandated policy. Unregulated, the Internet and other information services have grown exponentially, giving birth to numerous small, medium, and large businesses. The market for information services has developed into an unmitigated success – in large part due to its unregulated status as well as its ability to respond rapidly to shifts in consumer demand and rapidly-changing technology. Introducing regulation to this vibrant. constantly changing medium would stifle its growth and slow the emergence of new applications.

II. THE FCC's REFUSAL TO CLASSIFY ISPs AS REGULATED PROVIDERS OF "TELECOMMUNICATIONS" IS SOUND PUBLIC POLICY

The Commission's interpretations of the terms discussed above were consistent with statute and the intent of Congress revealed by the express statutory provisions and legislative history. In addition, the Commission's actions were consistent with the current universal service subsidy mechanism and the competitive dynamic of the information services market.

A. ISPs Already Contribute to the Universal Service Subsidy System

As customers of both the interexchange carriers ("IXCs") and the LECs, ISPs already are the ultimate payers of universal service subsidies because the carriers raise their rates to recover any universal service contributions they are required to pay. As a result, the universal service subsidy is already paid by customers, including ISPs, not carriers.

In addition, ISPs pay for the universal service subsidies to eligible LECs through a number of end user charges. ISPs subsidize the LECs' universal service costs by paying state-tariffed rates for LEC services – such as local business line service – that are set above-cost for business users in order to reduce the rates for residential service and service to high-cost areas. In addition, the ISPs' customers pay higher second line rates that subsidize primary line service. Finally, both ISPs and their customers also pay higher monthly subscriber line charges ("SLCs") for local loops to subsidize the SLCs paid by residential subscribers, even if the costs of serving both loop types is identical.

ISPs, like other users, also foot the bill for the universal service contributions paid by the IXCs. ISPs pay directly when the IXCs raise their rates to "flow-through" the universal service contributions and higher access charges IXCs pay to the LECs when the end user is a business customer.

B. Regulation Should Not Be Extended To A Competitive, Unregulated Market

The information services market is robustly competitive, producing low prices, innovative products, and consumer choice. The Commission has repeatedly recognized that fundamentally competitive markets do not require a pervasive regulatory scheme and that such regulation can be counter-productive.[14] The

[14] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1(1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17, 308 (1982); Second Report and Order, 91 FCC 2d 59 (1982), recon., 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46, 791 (1983); Fourth Report and Order , 95 FCC 2d 554 (1983), vacated. *AT&T v. FCC*, 978 F. 2d 727

performance of the information services market demonstrates the validity of this approach. The unregulated, competitive information services market has been a fertile source of innovative products and applications whose beneficiaries include not only consumers but regulated providers of telecommunications. As the information services market has stimulated consumer demand and technological innovation, providers of regulated telecommunications have experienced record growth and revenues. As their customer bases and revenues have grown, the dollar impact of universal service subsidies on individual customers has been ameliorated.

By refusing to classify ISPs as providers of "telecommunications," the Commission properly recognized that a fully competitive information services market furthers universal service policies more effectively and more efficiently than a misguided effort to subject a competitive market to regulation.

ISPs operate in a vigorously competitive marketplace characterized by low prices, innovative products, and consumer choice. Had the Commission ignored the plain language and legislative history of the 1996 Act and classified ISPs as providers of "telecommunications," the vigorously competitive information services market would have been subjected to a pervasive regulatory scheme developed for monopoly providers of commodity transmission services. That result would have been patently inconsistent with the purpose and policies underlying the Act.

(D.C. Cir. 1992), rehearing *en banc* denied, January 21, 1993; Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd *MCI Telecommunications Corp. v. FCC*, 765 F. 2d 1186 (D.C. Cir. 1985).

By refusing to regulate ISPs through re-classification of their services as "telecommunications," the Commission acted consistently with the policy objectives of a Congress that did *not*, in the 1996 Act, make any attempt whatsoever to regulate the competitive information services market. Had Congress intended through the 1996 Act to implement so fundamental and comprehensive a change in the regulatory treatment of ISPs, it would have done so explicitly. No such provisions appear anywhere in the Act but provisions establishing the opposite policy do (like Section 230, discussed above). Congress recognized that a fully competitive information services market furthers universal service policies more effectively and more efficiently than any effort to subject a competitive ISP market to regulation.

III. THE FCC's INTERPRETATION HAS NO IMPACT ON THE PROVISION OF UNIVERSAL SERVICE

Congress directed the Commission to assess the impact on universal service of its statutory interpretations. The simple truth is that the Commission's interpretations of the disputed definitions will have no adverse impact on universal service funding because of the mechanisms by which universal service subsidies are sized and collected.

The size of the universal service fund is determined by the costs of subsidy *recipients*, whether the costs are actual costs reported by the ILECs or benchmark costs calculated through the use of computer modeling techniques. In either case, the amount of the fund does not vary with the number or identity of fund *contributors*, although the contributors' *pro rata* shares may vary. Under the current universal service subsidy mechanisms, subsidy recipients will receive the same dollar amount for

universal service reasons whether or not ISPs are required to contribute. Accordingly, the Commission's determination that "telecommunications" does not include "information services" has no impact on universal service funding levels.

CONCLUSION

The Commission should not waver from its pro-competitive, de-regulatory approach to information services. The Commission's decision more than a decade ago to let competition spur the development of an information services market has produced significant and fundamental economic growth in the telecommunications sector of the national economy and has stimulated inestimable consumer benefits. Accordingly, ITI and ITAA urge the Commission to continue its approach and affirm its previous interpretations of the statutory terms discussed above.

Respectfully submitted,

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Certificate of Service

I, Suzanne M. Takata, hereby certify that true and correct copies of the preceding Comments of the Information Technology Industry Council and the Information Technology Association of America in CC Docket Number 96-45 (Report to Congress) were served this 26th day of January, 1998 via hand delivery to the following parties.

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